179

CLERK'S COPY

402909

Sup. Ct.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 141

VIRGINIA VANDENBARK, PETITIONER,

vs.

THE OWENS-ILLINOIS GLASS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 11, 1940.

CERTIORARI GRANTED OCTOBER 21, 1940.

Blank Page

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 141

VIRGINIA VANDENBARK, PETITIONER,

vs.

THE OWENS-ILLINOIS GLASS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 7, 1940.

—716

Blank Page

[fols. a-1] [Captions omitted]

[fol. 2]

IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

No. 4199

VIRGINIA VANDENBARK,

vs.

THE OWENS-ILLINOIS GLASS COMPANY

SUMMONS AND MARSHAL'S RETURN—Filed April 5, 1937

The President of the United States of America to the Marshal of the Northern District of Ohio, Greeting:

You are hereby commanded to notify The Owens-Illinois Glass Company, Toledo, Ohio (John H. McNerney, 965 Wall St.) that it has been sued by Virginia Vandenbark, Phoenix, Arizona, in the District Court of the United States, within and for the Western Division of the Northern District of Ohio, and that unless it answers by the 1st day of May, A. D. 1937, the petition of the said plaintiff against it filed in the Clerk's office of said Court, at Toledo, Ohio, in said Division and District, such petition will be taken as true, and judgment will be rendered accordingly.

You will make due return of this summons on the 12th day of April, A. D. 1937.

Witness, the Honorable Paul Jones, the Honorable Geo. P. Hahn, the Honorable S. H. West, and the Honorable John M. Killits, District Judges of the United States, and the seal of said Court, this 29th day of March, A. D. 1937, and in the 161st year of the Independence of the United States of America.

C. B. Watkins, Clerk, by George H. Blossom, Deputy Clerk.

Returnable Second Monday after Issue. Answer Day, Third Saturday after Return Day.

Indorsement: "Action for money only in the amount of One Hundred Twenty-five Thousand Dollars ($125,000.00), for costs herein and for all other proper and just relief."

[fol. 3] Returnable April 12, 1937. Answer day May 1, 1937, $000000 deposited for costs.

Paul D. Smith, Marion, Ohio. Thomas H. Sutherland, Marion, Ohio, Plaintiff's Attorney.

(over)

U. S. Marshal's Return

THE UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

Received this writ at Toledo, Ohio, on March 30th, 1937, and on March 30th, 1937 at Toledo, Ohio, I served it on the within-named The Owens-Illinois Glass Company, by serving John H. McNerney, its secretary and asst. treasurer, personally, at the office of the company in Toledo, Ohio, by handing to him a true and certified copy hereof with all indorsements thereon.

George J. Keinath, U. S. Marshal, by Edward F. Poss, Deputy.

[File endorsement omitted.]

[fol. 4] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

FIRST AMENDED PETITION—Filed June 1, 1937

Now comes the plaintiff for her petition and says that she is a citizen of the United States, a resident and citizen of the State of Arizona, and that The Owens-Illinois Glass Company, defendant, is a corporation duly organized for profit under the corporation laws of the State of Ohio with its main office in Toledo, Lucas County, Ohio, but with an office and factory located in Newark, Licking County, Ohio. Plaintiff says further that this case involves more than Three Thousand Dollars ($3,000.00) exclusive of interest and costs.

Plaintiff alleges further that during the time herein mentioned and plaintiff's employment that defendant had regularly in its service three or more employees, and that it com-

plied with Ohio General Code 1465-69 and 1465-69b by making payments into the State Insurance Fund and into the occupational disease fund.

Plaintiff further says that said defendant employed her every working day, with the exception of three or four of said days, from March 1, 1935 to and on May 31, 1935 to work in the factory, particularly in the laboratory thereof, located in said City of Newark, County of Licking, State of Ohio. [fol. 5] Plaintiff says her duties while employed by the defendant were to test samples of so-called glass "wool" by separating said samples into "slugs" and into good fibers and then weighing the "slugs" and also the good fibers in order to determine the percentage of good glass fiber. Plaintiff says further that she performed the "ignition test" by placing weighed amounts of glass into an oven where it was heated and some times melted into a small ball, and then she determined the loss of weight resulting from the application of heat to the known weight of glass fiber. Plaintiff further says that her duties also required her to perform the tensile strength test upon said glass fibers to determine the strength of, or amount of weight that said fibers would hold before breaking.

Plaintiff alleges further that in making the various tests, the small fibers of glass were placed on pieces of black velvet and than when the tests were completed the glass fibers on the black velvet were swept off with a small broom and that this caused tiny particles of glass to become and remain suspended in the air where this plaintiff worked. Plaintiff further says that said defendant ordered and required her to do the work in this way.

Plaintiff alleges that she did not, at the time she alleges to have been disabled, have knowledge of the alleged dangers and dangerous conditions and says that she lacked the mental capacity and education to understand the alleged dangers and dangerous conditions.

Plaintiff alleges further that prior to her employment by the defendant that she was in good health and able to do a good day's work.

It is further alleged that many chemical tests were run in the same room or laboratory where this plaintiff worked, and that there were often produced therein many fumes and gases, the composition of which this plaintiff is not informed, which permeated the atmosphere of the room where this plaintiff was working.

[fol. 6] It is alleged that such fumes, gases, particles of glass, dusts, silica, silica compounds, and chemicals were all poisonous and injurious and irritable to the entire body and health of this plaintiff. Plaintiff says that each of the above compounds were breathed by her in the course of her employment by this defendant. Plaintiff further says that equipment is and was available through the use of which the work done by plaintiff for this defendant could have been done safely and that defendant could have prevented the conditions and disabilities now alleged present in this plaintiff.

Plaintiff alleges that defendant, during its employment of this plaintiff, through defendant's negligence, inflicted upon her the conditions of pneumoconiosis, silicosis, fibrosis, sinusitis, tuberculosis, allergic asthma, bronchiectasis, and has lowered her general bodily resistance to all disease.

Plaintiff says that these conditions are the contributing and proximate cause of her permanent and total disability, and that her alleged conditions and her alleged permanent and total disability was contributed to and caused wholly, solely, directly and proximately by the negligence of defendant and its authorized agents in the following particulars, to-wit:

That the defendant failed to furnish plaintiff during each day she worked with pure air to breathe while in their employ, and failed to furnish safe employment and failed to do everything reasonably necessary to protect the plaintiff's life, health, safety and welfare; that defendant failed to supply or require the use of air filters, respirators, air helmets, hoods or goggles; that defendant supplied no forced ventilation at all in said laboratory; that defendant failed to furnish and adopt rules requiring the wearing of such protective devices; that defendant failed to adopt or enforce any rules whatsoever for the protection of this plaintiff; [fol. 7] that defendant failed to warn and instruct this plaintiff or make any explanation of any dangers of the risk and danger to her health in the work which she was ordered to do; that defendant failed to instruct plaintiff in any way as to any methods of protecting herself against the chemicals and small particles of glass hereinbefore mentioned and to advise her how to prevent their inhalation; that no notices advising her of any dangers to her health from such glass or chemicals or compounds herein-before mentioned were ever given, posted or sent to her by defendant; that defendant failed to utilize or apply the knowledge of science and

medicine available to factory executives to discover the disability herein elsewhere alleged.

Plaintiff says defendant, its officers and supervisors superior to this plaintiff failed to inform and advise, and did knowingly and intentionally conceal from her all the material acts and facts as in this petition alleged.

Plaintiff says that she has been a patient in one sanitarium and a hospital and has had many doctors in attendance for treatment and examination, and that she has been at considerable expense in the approximate amount of One Thousand Dollars ($1,000.00). Plaintiff says that during her employment by this defendant her earnings were approximately Thirty-Dollars and Eighty Cents ($30.80) every two weeks, at the rate of 25¢ per hour.

Plaintiff says that because of, and directly due to, the negligence of the defendant, that she has been permanently and totally disabled since the time of her last employment at defendant's factory, and that she has good reasons to believe that she will remain permanently and totally disabled for the remainder of her natural life, and does here allege that she will be permanently and totally disabled during the remainder of her life; that from the date of her last employment with defendant company and to the present time she has experienced much pain and suffering as a result of [fol. 8] the negligence herein alleged; that she is now, at the time of filing this petition, twenty-two years of age. Plaintiff says that because of the disabilities herein above alleged she has been forced to change her abode and residence to the State of Arizona. Plaintiff says that she has been damaged to and in the extent of One Hundred Twenty-Five Thousand Dollars ($125,000.00).

Wherefore, plaintiff prays for judgment against defendant, The Owens-Illinois Glass Company, in the amount of One Hundred Twenty-five Thousand Dollars ($125,000.00), for her costs herein, and for all other just and proper relief.

Virginia Vandenbark, by Paul D. Smith and Thomas H. Sutherland, Her Attorneys.

I hereby certify that I mailed a copy of the above petition to Williams, Eversman & Morgan, Attorneys for defendant, Toledo, Ohio, on this 29th day of May, 1937.

Paul D. Smith.

[fol. 9] *Duly sworn to by Virginia Vandenbark. Jurat omitted in printing.*

[fol. 10] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

DEMURRER—Filed June 10, 1937

The defendant, Owens-Illinois Glass Company, demurs to the amended petition, for the reason that said amended petition does not state facts which show a cause of action.

Williams, Eversman & Morgan, Attorneys for Defendant.

June 10, 1938.
Demurrer sustained.
(Signed) Frank L. Kloeb, U. S. District Judge.

[fol. 11] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DISMISSING CASE—Filed August 13, 1938

It appearing to the Court that heretofore, to wit, on June 10, 1938 an order was entered herein sustaining the defendant's demurrer, and

It further appearing that plaintiff, by her Counsel, has represented to the Court that she does not desire to plead further in this case, now

It is Ordered that the case be and the same hereby is dismissed at the costs of the plaintiff, Virginia Vandenbark, for the reason that the amended petition fails to state facts which show a cause of action against the defendant herein.

(Signed) Frank L. Kloeb, United States District Judge.

Toledo, Ohio, August 13, 1938.

Approved as to form: Paul D. Smith, Atty. for Pl., and Thomas H. Sutherland, Atty. for Pl., Williams, Eversman & Morgan, for Deft.

[fol. 12] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

APPLICATION TO PROCEED FURTHER IN FORMA PAUPERIS—Filed August 23, 1938

Now comes the plaintiff and respectfully requests permission of this court to proceed further in forma pauperis in this cause, to-wit:

To appeal same to the United States Circuit Court of Appeals Sixth Circuit, as per attached petition.

It is further stated that, since the original filing of this case, there has been no contract of any kind made regarding fees, in the event of recovery; and to our belief and knowledge there has been no change in her condition of poverty.

Respectfully submitted, Paul D. Smith, Marion, Ohio; Thomas H. Sutherland, Marion, Ohio.

[fol. 13] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

POVERTY AFFIDAVIT—Filed August 23, 1938

STATE OF ARIZONA,
County of Maricopa:

Virginia Vandenbark being first duly cautioned and sworn according to law in such cases says that she is now and was at all times mentioned in this cause, a citizen of the United States; that she is the plaintiff in the above entitled action and is entitled to commence and maintain the same in this Court.

Said Virginia Vandenbark further states the fact to be that because of her poverty, she is unable to pay the costs of said action on appeal or to give security for the same, and that there is no other person interested by contract or otherwise in her share of the rights in said cause of action, or entitled to share in her part of any recovery sought there-

under; that she believes she is entitled to the redress sought by this action, and that the nature of the cause of action is correctly and concisely set out in the petition of said cause in the District Court, as well as in the appeal papers of said cause.

Said Virginia Vandenbark further states that because of [fol. 14] the injury and disabilities complained of in this cause she has been unable to do any work at all and that she has been forced to rely upon persons other than herself, to supply her with the necessaries of life; that she has been unable to do any gainful work; that she has no income whatsoever of her own.

This appellant therefore prays that she may have leave to prosecute said suit in forma pauperis, pursuant to the statutes in such cases and subject to the rules of this court in such cases provided.

Virginia Vandenbark.

Subscribed by the said Virginia Vandenbark in my presence and by her sworn to before me as true this first day of August, 1938. B. T. Bolin, Notary Public. (Notarial Seal.)

[fol. 15] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed August 24, 1938

To the Honorable Frank L. Kloeb, Judge of the District Court aforesaid:

Now comes Virginia Vandenbark by her attorneys and respectfully shows that on the 10th day of June, 1938, the Court sustained a demurrer of defendant herein to dismiss plaintiff's first amended petition for the reason that said amended petition did not state facts which showed a cause of action and upon the 13th day of August, 1938, said Court entered a final judgment against your petition, dismissing said case.

The said cause is one wherein your petitioner prays for damage against the defendant for the infliction of certain

physical disabilities alleged caused by the negligence of defendant, for which disabilities plaintiff has no remedy whatsoever under the Workmen's Compensation Act of Ohio, and has no remedy whatsoever except said negligence action which has been heretofore dismissed upon demurrer as herein above stated.

Your petitioner, feeling herself aggrieved by the said final judgment entered thereon as aforesaid, herewith petitions [fol. 16] the Court for an order allowing her to appeal to the Circuit Court of Appeals of the United States for the Sixth Circuit, under the laws of the United States in such cases made and provided, for the reasons specified in the assignment of errors filed herewith.

Wherefore, the premises being considered, your petitioner prays that a writ of error issue and that an appeal in this behalf to the United States Circuit Court of Appeals aforesaid, be allowed for the correction of the errors complained of and herewith assigned, and that an order be made allowing this appeal in forma pauperis in accordance with the application to proceed further in forma pauperis filed herewith.

Virginia Vandenbark, By Paul D. Smith, and Thomas H. Sutherland: Attorneys for Petitioner.

[fol. 17] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed August 24, 1938

Now Comes, by her attorneys, Virginia Vandenbark, Plaintiff in the above numbered and entitled cause, and in connection with her petition for writ of error in this cause assigns the following errors upon which she relies to reverse the judgment entered in the above cause on the 10th day of June, 1938, inasmuch as said judgment is erroneous and unjust to this plaintiff appellant:

(1) Because the Court rred in sustaining the demurrer of defendant to the amended petition of the plaintiff-appellant.

(2) Because by sustaining said demurrer the Court erred in holding the plaintiff's amended petition does not state facts which show a cause of action.

(3) By failing to hold that Section I of the Fourteenth Amendment to the United States Constitution grants and guarantees this petitioner a cause of action.

(4) In holding that Section 1465-70 of the General Code of Ohio was not violative of Section I of the Fourteenth Amendment to the United States Constitution, insofar as it denied to this petitioner the right to a civil action at law [fol. 18] for negligence.

(5) In holding that Section 35, Article II Ohio Constitution was not violative of Section I of the Fourteenth Amendment to the Constitution of the United States insofar as it denies this petitioner the right to a civil action at law for negligence.

(6) In holding that Section 35, Ohio Constitution denies to this petitioner all remedy and that such construction of said Constitution is so arbitrary, unreasonable and unjust as to contravene the guarantees of Section I, Fourteenth Amendment to the United States Constitution.

(7) In holding that Section 1465-70 of the Ohio General Code constitutes a bar to this action and that said construction is so arbitrary, unreasonable and unjust as to contravene the guarantees of Section I, Fourteenth Amendment to the Constitution of the United States.

(8) By failing to hold that the Federal Courts may follow the common law and that they are not bound by the state courts or state rules in cases where the jurisdiction of the Federal Court rests upon a diversity of citizenship, as in this case.

(9) That the right to a general federal common law is a derivative right of the federal court system and is not a power reserved to the states by the Tenth Amendment.

(10) By entering the final order dismissing the cause August 13, 1938.

Wherefore, on account of the errors herein before assigned petitioner prays that the said judgment of the District Court of the United States for the Northern Dis-

trict of Ohio, Western Division, dated the 10th day of June, 1938, in the above entitled cause, be reversed and judgment entered in favor of this appellant.

By Paul D. Smith, and Thomas H. Sutherland, Attorneys for Plaintiff and Appellant.

[fol. 19] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed August 24, 1938

It appearing that the plaintiff in the above entitled cause has filed in this court a petition for appeal from the final judgment herein dated August 13, 1938, together with an assignment of errors and prayer for reversal, it is hereby ordered that an appeal as prayed for in said petition be, and it is, hereby allowed in forma pauperis.

(Signed) Frank L. Kloeb, United States District Judge for the Northern District of Ohio.

[fol. 20] Citation in usual form showing service on Williams, Eversman & Morgan filed Aug. 26, 1938, omitted in printing.

[fol. 21] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

PRECIPE FOR TRANSCRIPT OF RECORD—Filed September 1, 1938

To the Clerk of said Court:

Please prepare and certify to the United States Circuit Court of Appeals, Sixth Circuit, a transcript of the record in the above entitled cause, said transcript consisting of the following:

(1) Service and Return on Original Petition.
(2) First Amended Petition.

(3) Demurrer of Defendant.
(4) Journal Entry of the Court sustaining Plaintiff's Demurrer.
(5) Journal Entry filed August 13, 1938, dismissing Plaintiff's Petition.
(6) Application to Proceed further in Forma Pauperis.
(7) Affidavit of Plaintiff in Forma Pauperis.
(8) Petition for Appeal.
(9) Assignment of errors.
(10) Allowance of Appeal.
(11) Citation and Service thereon.
(12) This Precipe and Service thereon.

[fol. 22] Paul D. Smith, Marion, Ohio; Thomas H. Sutherland, by P. D. S., Marion, Ohio, Attorneys for Plaintiff and Appellant.

CERTIFICATE

We, the undersigned, Attorneys for Defendant-Appellee, do hereby certify that we received a copy of the above precipe from Paul D. Smith and Thomas H. Sutherland, Attorneys for the Plaintiff-Appellant, and accept service of said precipe this 29 day of August, 1938.

Williams, Eversman & Morgan, Attorneys for Defendant-Appellee.

[fol. 23] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 24] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

CAUSE ARGUED AND SUBMITTED

(February 8, 1940. Before Simons, Allen and Arant, JJ.)

This cause is argued by Paul D. Smith and Thomas H. Sutherland for Appellant, and by Lawrence E. Broh-Kahn for Appellee and is submitted to the court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—Filed and Entered March 13, 1940

Appeal from the District Court of the United States for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

[fol. 25] UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

No. 8151

VIRGINIA VANDENBARK, Appellant,

v.

THE OWENS-ILLINOIS GLASS CO., Appellee

Appeal from the United States District Court for the Northern District of Ohio, Western Division

OPINION—Filed March 13, 1940

Before Simons, Allen and Arant, Circuit Judges

SIMONS, Circuit Judge:

The judgment assailed by the appeal is one dismissing a suit to recover for occupational diseases allegedly contracted by the appellant while employed in the glass factory of the appellee. The motion to dismiss was sustained on the ground that the petition failed to state a cause of action cognizable under Ohio law against an employer complying with the provisions of the Workmen's Compensation Act, Ohio General Code, Section 1465-70.

It was conceded at the outset that when the judgment was rendered, decisions of the courts of Ohio were contrary to the contentions of the plaintiff, but the appeal should be given consideration, it is urged, because of two changes in

Ohio law since the entry of the challenged judgment, one a shift of judicial interpretation of the Workmen's Compensation Act by the Ohio Supreme Court, expressly overruling previous decisions as to compensability for occupational diseases, and the other an amendment to the Act to include a disease charged in the petition to have been contracted by the plaintiff while in the employ of the defendant. The problem being thus stated, the court, of its own motion, called attention to the then recently decided case of Peter J. Carpenter v. Wabash Ry. Co. et al., — U. S. [fol. 26] —, announced January 29, 1940, and requested the views of counsel as to whether it bore upon the present controversy, and if so, whether the cause should be remanded to the District Court for consideration of the changes in Ohio law in the light of the holding and reasoning of the Carpenter case. Counsel requested opportunity to file supplemental briefs dealing with questions suggested by the court. They have now been received and given consideration.

Article 2, Section 35 of the Constitution of Ohio, authorizes the passing of laws establishing a state fund out of which to pay compensation for death, injuries or occupational diseases, payment to be in lieu of all other rights to compensation or damages from any employer who pays the premium or compensation provided by law, the employer not to be liable to respond in damages at common law or by statute for such death, injuries or occupational disease. The original Workmen's Compensation Act, enacted in 1913 by virtue of this authority, included no provision for compensation due to occupational disease. By amendment, however, effective August 5, 1921, specific provision was made for compensation for 15 enumerated occupational diseases. By amendment effective July 21, 1929, the number of such occupational diseases was increased to 18, and by still another amendment effective July 18, 1931, the number was increased to 21. Upon to the time of the judgment below, however, the schedule of compensable occupational diseases failed to include those complained of in the appellant's petition, or her amended petition. In the pleadings it was conceded that the defendant had complied with the Workmen's Compensation Act, both with respect to industrial accidents and occupational diseases.

For almost 25 years it had been the law of Ohio that the common law right to recover for occupational disease con-

tracted in the employ of those complying with the terms of the Workmen's Compensation Act had been taken away by Section 1465-70 of the General Code, the leading cases announcing the rule being Zajachuck v. Willard Storage Battery Co., 106 O. S. 538; Mabley & Carew Co. v. Lee, 129 O. S. 69, 73. It was said in the latter case, "it is readily apparent that the present amendment provides a new and comprehensive definition of the rights and liabilities of employers and employees. Under it certain new rights were created and some former ones were abolished. * * *"

Some months after the judgment below, and while appeal therefrom was pending, a divided Ohio Supreme Court in the consolidated case of Triff, Admx. v. Nat'l Bronze & Alu- [fol. 27] minum Foundry Co. and Smith v. Lau, 135 O. S. 191, abandoned its earlier view of the effect of the Ohio statute and expressly reversed the Zajachuck and Mabley & Carew Company cases. Likewise, after judgment below and effective July 31, 1937, the Ohio legislature again amended the Workmen's Compensation Act by adding silicosis to the schedule of occupational diseases therein made compensable, this disease being one charged in the plaintiff's petition to have been contracted by her while in the defendant's employ.

Save for alleged constitutional infirmity not vigorously pressed, it is conceded that when the court below dismissed the plaintiff's petition it correctly applied the state law under the mandate of Section 34 of the Judiciary Act as its rule of decision. This brings us to the question whether a judgment of a Federal Court, in a diversity of citizenship case, right when entered, must be set aside because of a new pronouncement by the court of last resort of the state in the construction of a state statute, or by a subsequent amendment to the statute.

It has long been settled law that the Federal Courts have an independent jurisdiction in the administration of State laws coordinate with, and not subordinate to, that of the State Courts, and are bound to exercise their own judgment as to the meaning and effect of those laws when interpretation has not been settled by definitive interpretation by the State Courts, and when rights have accrued under a particular state of the decisions they may adopt their own interpretation of the law applicable to the case, although a different application may be adopted by the State Courts after such rights have accrued. Burgess v. Seligman, 107 U. S. 33. A decision of the highest court of the State construing

a State Statute rendered after a judgment of a Federal District Court, cannot be given a retroactive effect so as to make that erroneous which was not so when the judgment of that court was given. Concordia Insurance Company of Milwaukee v. School District 98, 282 U. S. 545; Board v. Deposit Bank, 124 Fed. 18 (C. C. A. 6).

The precise question that meets us here is whether a Federal District Court has correctly applied state law at the time decision was made, and must not be confused with situations calling for the application of the rule governing decision of a case involving state law at the time it first reaches a Federal reviewing court, or the rule governing decision of cases involving federal law by reviewing courts thus unfettered by Section 34 of the Judiciary Act. Michalek v. [fol. 28] United States Gypsum Co., 298 U. S. 639, doesn't reach it. Colorado and Santa Fe v. Dennis, 224 U. S. 503, is an appeal from the decision of the court of last resort of the state and not from a decision of a lower Federal Court, right when made. Crozier v. Fried et al., 224 U. S. 290, and Watts, Watts and Co., Ltd. v. Unione Austriaca, etc., 248 U. S. 911, are admiralty and patent cases decided upon the original record, and in such cases the court is required to dispose of the issues as justice may require, and as law then existing compels. If the District Court had decided the present case adversely to the appellee, it would have defied the mandate of the Judiciary Act. It would be anomalous to now hold the decision right because it was then wrong, or that a state court has power to compel reversal of a federal decision correctly applying existing state law. In any event, if the principle stated in Colorado & Santa Fe v. Dennis is to be given general application regardless of the circumstances to which it applies, we must ignore the later cases of Concordia Ins. Co. v. School District, supra, and Edward Hines, Trustee v. Martin, 268 U. S. 458, and consider as overruled the earlier decisions of Morgan v. Curtenius, 20 How. 1, 3; Pease v. Peck, 18 How. 595, 598; Roberts v. Bolles, 101 U. S. 119, 128, 129; Burgess v. Seligman, supra. It is not for us to hold these decisions overruled without some clear pronouncement by the Supreme Court.

In Carpenter v. Wabash Ry. Co., supra, the court considered the effect of an amendment to the Bankruptcy Act made subsequent to the entry of a judgment for personal injuries against an equity receiver, the filing of a claim

based upon such judgment with an assertion of its priority, the denial to it of preferred status by the District Court, and affirmance of the judgment by the Court of Appeals. The amendment for the first time gave such claims the same priority against equity receiverships of railways as they had had previously against trustees in bankruptcy. Assuming that the determination by the Court of Appeals, as the law then stood, was correct upon the record, the court stated the controlling principle to be that announced by Chief Justice Marshall in United States v. Schooner Peggy, 1 Cranch 103, 110, as follows:

"It is the general rule that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law [fol. 29] must be obeyed, or its obligation denied. * * * In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside."

Lifted from its context in the original decision or in that in which it is quoted, the principle, if of universal application, would seem to indicate reversal. We may not, however, so insulate it.

In its application to the facts of the Carpenter case, the Supreme Court was not content to rest decision upon the bare statement of principle as though it would universally apply. It was careful to point out that the Federal Statute involved applied to equity receiverships of railroad corporations "now * * * pending in any court of the United States," and that it was considering such a case. This was in recognition of the fact that the statute was, by its terms, retroactive in respect to claims that were still pending, notwithstanding they had arisen and been liquidated prior to the enactment of the amendment, and is not departure from the rule so often proclaimed that a law is presumed, in the absence of clear expression to the contrary, to operate prospectively. U. S. v. Heth, 3 Cranch 399, 413; Shwab v. Doyle, 258 U. S. 529; United States v. Magnolia Petroleum Co., 276 U. S. 160, 172, or its necessary converse, that for a statute to be construed as operating retrospectively, its retrospective character must be derived from "the unequiv-

ocal and inflexible import of the terms, and the manifest intention of the legislature"; Union Pacific Ry. Co. v. Laramie Stockyards, 231 U. S. 190, or as said in United States v. Heth, supra, the declaration of retroactivity must be "clear, strong and imperative." Neither expressly or by implication is the established law in this respect overthrown. The amendment to the Ohio Statute here involved is not retroactive either expressly or by the necessary import of its terms, and is not claimed to be so.

The amended statute was, moreover, given effect in the Carpenter case not merely because, by the unequivocal import of its terms it was retroactive, but because it applied a statutory procedural remedy to bring about an equitable distribution of property, not exclusively the property of the mortgagees, but in the possession of the court, and because a reasonable classification of claims as entitled to priority by virtue of superior equities comes within the broad bank- [fol. 30] ruptcy power of the Congress to provide for distribution of assets of insolvent estates or those in liquidation. Thus the court was applying an amendment which altered no definitive private rights or liabilities matured before its effective date, but one which empowered the court in the exercise of bankruptcy powers to effectuate the Congressional concept of equitable distribution of property still in custodia legis.

An added ground of distinction urged by the appellee, may be mentioned without the need of resting decision thereon. It is pointed out that the Carpenter case deals with a controversy lying wholly within an integrated judicial system, while here we deal with an appeal from a court under compulsion of rules of comity, and the specific mandate of the Judiciary Act to apply the rule of decision presently in force in a coordinate system of courts. Having rightly applied it, later decisions of the State Court do not require reversal, and the cases so holding not being within the rule of Swift v. Tyson, 16 Pet. 1, since the rule of decision involved a State Statute, are not overruled by Erie Railroad Co. v. Tompkins, 304 U. S. 64.

The constitutional attack of the appellant upon the validity of the State Court decisions announcing the rule applied in the judgment below, need give us little concern. The arguments supporting it were urged, with great insistence, by present counsel in the case of Mozingo v. Marion

Steel Shovel Co., 130 O. S. 591, and in the application for rehearing thereon, but were rejected by the Ohio Supreme Court. An appeal to the Supreme Court of the United States was dismissed without opinion for want of a substantial Federal question, 298 U. S. 645.

We consider finally, the necessity or propriety of remanding the cause to the District Court so that it may pass upon the sufficiency of the appellant's petition in view of the altered interpretation of the Ohio Court, and of the amended statute. The Carpenter case, supra, points the road to decision thereon. A similar contention was there made and rejected. If we are right in our view that Ohio decisions, extant at the time of trial, control the judgment, notwithstanding a later change of view, and that the amended Ohio Statute not being retroactive by the clear import of its terms does not require a reversal of the judgment, there is no issue to be submitted to the court below that may not here be decided upon the present record.

The judgment below is affirmed.

[fol. 31] DISSENTING OPINION

ALLEN, Circuit Judge, dissenting. I cannot agree with the conclusion of my associates. The judgment in Triff, Admx. v. Foundry Co., 135 Ohio St. 191, which held that the employee has a right of action against his employer for silicosis directly caused by the employer's negligence, is binding upon us here. The gist of this decision, which is the latest utterance of the Supreme Court of Ohio upon this question, is that the employee has in Ohio a cause of action at common law for occupational disease arising out of neglect of the employer. While Section 1465-70, General Code of Ohio, is cited both in the syllabus and in the opinion, and other sections of the Ohio Code are also discussed for the purpose of determining whether they have taken away the common law right of the employee, since the court held that this right had not been altered by these sections of the statute, the decision falls squarely within the purview of Erie Rd. Co. v. Tompkins, 304 U. S. 64. That case declared that "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the

State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."

Nor is the doctrine declared in Carpenter v. Wabash Ry. Co., 60 Sup. Ct. 416, limited as appears from the majority opinion. While that case relied upon United States v. Schooner Peggy, 1 Cranch 103, 110, an extract from which appears in the majority opinion, it also relied upon other decisions cited, among which is Gulf, Colorado & Santa Fe Ry. Co. v. Dennis, 224 U. S. 503. The court in that case, applying the principle of United States v. Schooner Peggy, supra, stated:

"We think what was there said is, in principle, applicable here. For while on a writ of error to a state court our province ordinarily is only to inquire whether that court has erred in the decision of some Federal question, it does not follow that where, pending the writ, a statute of the State or a decision of its highest judicial tribunal intervenes and puts an end to the right which the judgment sustains, we should ignore the changed situation and affirm or reverse the judgment with sole regard to the Federal question. On the contrary, we are of opinion that in such a case it becomes our duty to recognize the changed situation, and either to apply the intervening law or decision or to set aside the judgment and remand the case so that the state court may [fol. 32] do so." Cf. Crozier v. Fried. Krupp Aktiengesellschaft, 224 U. S. 290; Watts, Watts & Co., Ltd. v. Unione Austriaca, &c., 248 U. S. 9, 21. As stated in the Watts case (p. 21), the court has power not only to correct error in the judgment entered below, but to make such disposition of the case as justice may require; and in determining what justice now requires, the court must consider the changes in fact and in law which have supervened since the decree below was entered.

The judgment of the District Court should be reversed.

[fol. 33] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 34] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 28, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: In forma pauperis, File No. 44,490, U. S. Circuit Court of Appeals, Sixth Circuit, Term No. 141. Virginia Vandenbark, Petitioner, vs. The Owens-Illinois Glass Company. Petition for a writ of certiorari and exhibit thereto. Filed June 11, 1940. Term No. 141 O. T. 1940.